

**MEMORANDUM OF LAW TO REJECT CERTAIN BRIEFS OR
STRIKE DESIGNATED PARTS OF DEFENDANT-APPELLEES BRIEFS
AND FOR SANCTIONS**

The defendants-appellees' briefs cited below violate the Federal Rules of Appellate Procedure and the Local Rules of this Court by including numerous cites to documents outside the Joint Appendix to which they agreed, gratuitous ad hominem against the plaintiff-appellant Hollander, matter irrelevant and immaterial to the issues on appeal and failing to abide by the legal citation system of the Blue Book. The plaintiff-appellant requests striking such material specified below from various defendants' briefs and sanctions against the defendants' attorneys for wasting both this Court and the plaintiff's time on such matter.

Cites to the inappropriate matter in defendants-appellees' briefs include the brief's name, such as Mundy Brief, followed by a number, which is the page number, then a hyphen and a second number that refers to the paragraph on that page, which may or may not be a full paragraph. For example, Mundy Brief p.13-1 refers to the top three lines on page 13 while Mundy Brief p.13-2 refers to the next paragraph, which is a full paragraph.

Mundy Brief

The brief for defendants-appellees, Kuba, Mundy & Associates, Nicholas J. Mundy and Peter Petrovich (collectively "Mundy") violates the Federal Rule

of Appellate Procedure (“F.R.A.P.”) §30 by citing for support to documents not in the Joint Appendix. Mundy Brief p.4-2, 3; p.8-2, 3; p.9, n.4; p.10-1, 2, 3; p.11-1,3; p.12-2, n.6, 8; p.13-1, 2, 3; p.15-3; p.23-2, n.11; p.24, n.12(2)(Ex. A); p.25-3. Local Rule §11(e) states the parties have an “obligation under F.R.A.P. §30 to reproduce in an appendix to their briefs ... exhibits ... to which they ‘wish to direct the particular attention of the court.’”

This Court’s on-line document: “How To Appeal Your Civil Case” states at p. 5, “The appendix should contain those matters from the record on appeal which are cited in the briefs or required by the Court to be included, such as the relevant docket entries in the proceedings below; any relevant portions of the pleadings, charge, findings, or opinion; the judgment, order, or decision appealed from; and any other parts of the record to which the parties wish to direct the particular attention of the Court.”

If Mundy’s attorneys had wanted to direct the Court’s attention to documents not in the Joint Appendix, then they should have designated them under F.R.A.P. §30(a)(1)(D) & (b)(1), but they did not, instead they agreed to the Joint Appendix as it now stands. Even had they designated the numerous additional documents cited to in the Mundy Brief, the Court would have ignored them because this Court under the Federal Rules of Civil Procedure restricts its inquiry to “facts stated on the face of the complaint, in documents appended to

the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.” Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991); see also Fed. R. Civ. P. 10(c). Despite the clarity of the law on what’s allowable in considering an appeal of a Fed. R. Civ. P. 12(b)(6) ruling, Mundy’s attorneys are trying to slip in extraneous and untrustworthy documents not incorporated in the plaintiff’s pleadings with the ruse that since the documents are listed in the docket entries “produced by Hollander,” they are really in the Joint Appendix. Mundy Brief p.8, n.3.

Mundy’s attorneys even cite to their memoranda of law in the District Court that F.R.A.P. §30(a)(2) specifically excludes unless independent relevance is shown. They had ample opportunity to request any inclusions in the Joint Appendix at the Pre-argument conference on June 21, 2005 before Staff Counsel Stanley Bass or afterwards—but they did not.

Mundy’s attorneys citing to 35 documents comprising over 380 pages not in the Joint Appendix and citing these documents 25 times, usually without specific page cites, violate the purpose of F.R.A.P. §30 that “each appellate judge who hears the appeal will be able to follow the brief and relate the argument to the record by reference to the appendix. The appendix is thus an essential part of the paper on appeal and failure to comply with Appellate Rule §30 may result in drastic action.” 20A Moore’s Federal Practice, §330.11

(Matthew Bender 3d ed.) This is not a situation in which Appellate Rules permit citing directly to the record as when the Appendix is file after the briefs, F.R.A.P. §30(c), or the Court has ruled to dispense with the appendix, F.R.A.P. §30 (f). Even if it were, most of the cites outside the Appendix violate F.R.A.P. §28(e) by not referring to “the page of the original document.”

Mundy’s attorneys have gone outside the Joint Appendix that they agreed to so as to bring before this Court misleading, untrustworthy and defamatory information as part of their twin strategies of character assassination and disinformation—throw enough mud and maybe some will stick, make enough misrepresentations and maybe some will be believed. They try to swamp this Court, as they did the District Court, with documents irrelevant to the issues at hand because they know the courts do not have the time to check all the document citations for accuracy and that by just putting their allegations out, even on a Fed. R. Civ. P. 12(b)(6) appeal, may sway a court.

The Mundy Brief’s “Statement of the Case” at pp 2-5 violates the purpose of F.R.A.P. §28(a)(6) by using that section to personally vilify the plaintiff-appellant with many misleading and false allegations in a continuation of what can only be called “litigation by personal destruction.” Under Appellate Rules, the “statement of the case” is supposed to be a description of the procedural history indicating the case’s nature, course of proceedings and the disposition

below. F.R.A.P. §28(a)(6). Mundy’s lawyers, however, use that section and the rest of their brief section to replay their strategy of character assassination, which they successfully used in the District Court, in order to shut down the argument and marginalize the plaintiff so as to avoid a decision on the merits. The merits at this stage are whether the District Court properly dismissed the Complaint and Supplemental Complaint for not adequately alleging injury and causation under RICO. Discovery—not an appeal—is the more appropriate forum for exploring motivations and attacking witness or party credibility. The Mundy lawyers’ ad hominem attacks have no place in this Court under Local Rule 28: “Briefs must be ... free from ... scandalous matter.” The ad hominem statements appear in the Mundy Brief at p.3-2; p.8-3; p.9, n.4; p.10-1,2; p.11-1; p.12-1,2, n.8; p.13-1,3, p.21-3 (last sentence); p.25-3; p.59-2; p.60-2.

The Mundy Brief’s “Statement of Facts” at pp 5-25 violates F.R.A.P. §28(a)(7) and Local Rule §28 by presenting numerous factual allegations irrelevant and immaterial to the issues on appeal. Appellate Rule §28 requires identifying the facts that are “relevant to the issues submitted for review....” 20A Moore’s Federal Practice, §338.20[7]. Relevant means “[l]ogically connected and tending to prove or disapprove a matter in issue....” Black’s Law Dictionary, p. 1316 (8th ed.). Much of the Mundy Brief’s “Statement of Facts,” as well as other sections of their brief, are irrelevant because many of their

factual allegations aren't probative of the issues of compensable injury and proximate causation that the District Court restricted its decision to or other RICO issues raised in the defendants' brief at pp 50-59 that the District Court did not consider. The irrelevant sections are in the Mundy Brief at p.3-2; p.4-1; p.8-3; p.9, n.4; p.10-1,2,3; p.11-1, 3; p.12-1,2, n. 8; p.13-1,2,3,4; p.21-4 to p.22-1; p.23-2, n.11; p.25-3; p.59-3; p.60-2.

Further, at this stage of the proceeding, it's the plaintiff's pleadings that are considered true, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515, 30 L. Ed. 2d 642, 92 S.Ct. 609 (citation omitted)(1972), not the defendants' opinions of Hollander nor their self-serving and inaccurate protestations or misplaced allegations. The Mundy Brief presents allegations of fact that belong in answers and allege findings of facts that belong in summary judgment motions at the District Court level—not the Appeals Court. In so doing, Mundy's attorneys aim to obtain affirmation of a Fed. R. Civ. P. 12(b)(6) dismissal by having this Court consider extraneous material as part of the Complaint and Supplemental Complaint even though the plaintiff did not rely on such. In Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002), this Court stated, “[W]e reiterate here that a plaintiff's **reliance** on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or

possession is not enough.”(emphasis is the Court’s). This ploy of Mundy’s attorneys effectively prevents the plaintiff from refuting their assertions and claims through motions for a judgment on the pleadings or summary judgment because the case is now in the Circuit Court. An ingenious Star Chamber procedure that eviscerates the plaintiff’s due process rights by assuring against any chance of the plaintiff replying to these, in effect, counterclaims, or moving to reply to these stealth answers, or having a reasonable opportunity to make the record straight since affirmation of the lower court’s dismissal will end this judicial procedure except for an appellate rehearing and Certiorari to the U.S. Supreme Court.

Local Rule 28 also requires that briefs must be free from burdensome matter. Thumbing through hundreds of pages in memoranda and exhibits not in the Joint Appendix sounds rather burdensome. Whether scandalous, irrelevant, immaterial or burdensome, such material may be disregarded and stricken by the Court.

Mundy’s attorneys also violated F.R.A.P. §32(a)(4) and Local Rule §32(a) by submitting a brief with the right and top margins less than an inch.

Finally, Mundy’s attorneys included a number of incomplete cites to cases by leaving out the specific page on which the support for various propositions are suppose to appear. The Mundy Brief at p.44-1 cites to a string of eight cases

concerning compensable injury but fails to include the specific page referred to in any of the eight cases. This same tactic is used at p.39-2 (Ideal Steel) and p.34-3 (Lerner) for other propositions. The purpose of legal citation is to allow the reader to locate a cited source accurately and efficiently, The Blue Book §1.2 (17th ed.), which requires a specific page cite, id. §10.1. By omitting the specific page cites, Mundy's attorneys are effectively transferring that burden to the Court and the plaintiff.

The plaintiff requests this Court to reject the Mundy Brief for failing to follow the margin requirements. If the Court decides not to, the plaintiff-appellant requests all the narrative cited above in the Mundy Brief that relies on documents not in the Joint Appendix, that are ad hominem, irrelevant or fail to cite to the specific pages of case authorities be deleted from the Mundy Brief and not considered by this Court in making its decision. In addition, Mundy's attorneys submit a new brief with this material redacted. Further the plaintiff requests the Court impose monetary sanctions on Mundy's attorneys for wasting this Court's time and his by making this motion necessary. *See* Gilroy v. Erie Lackawanna R.R. Co., 421 F.2d 1321, 1323 (2d Cir. 1970).

Flash Dancer Brief

Attorneys for defendant-appellees Flash Dancers Topless Club, Jay-Jay Cabaret, Inc., Lynn Lepofsky, Barry Night Manager and Flash Dancers Manager

1 to 5 (collectively “Flash Dancers”) bare the same artifice as Mundy’s attorneys in violating F.R.A.P. §30 by citing to documents not in the Joint Appendix, Flash Dancers Brief p.2-1,2, n. 1-3, p.3-1, n. 4-5, p.8-4 to p. 9-1, p.13, n.9. They, as with all the other attorneys in this appeal, had agreed to the Joint Appendix, but clearly had their fingers crossed behind their backs at the time. If they had raised the issue of including these documents at the Pre-argument conference, the Court’s Staff Counsel would have prevented it. I was always troubled by their peculiar lack of talking at the conference. Anyway, by pretending to go along with the Joint Appendix, they, and the other attorneys, hoped to circumvent the rules and bring their own allegations into this appeal of a Fed. R. Civ. P. 12(b)(6) dismissal. In doing so, Flash Dancers’ attorneys also cavalierly tossed off F.R.A.P. §30(a)(2) that specifically excludes memoranda of law unless independently relevant. Using a quote from Mundy’s Memorandum of Law in the District Court that characterizes the Complaint as “read[ing] more like a Tom Clancy novel,” Flash Dancers Brief at p.2-1 may have relevance for a New York Times literature review but not an appeal to the second most prestigious court in the land. Besides, any school child knows truth is stranger than fiction.

Flash Dancers attorneys also try to replace justice’s blindfold with their own tainted veil of allegations for propositions irrelevant to the issues on appeal.

Id. p.2-1,2; p.3-1, n. 4-5. For example, they refer to a few efforts that occurred before plaintiff's discovery of the RICO Scheme. Id. p.2-2; p.3-1. They also fault the plaintiff for filing an action in New York State Court to toll the statute of limitations for one of the RICO pendent state claims and even lie about the Federal Bureau of Investigation not taking any action when it actually opened an investigation into some of the Complaint's allegations. They even call stripping "performing," id. p.4-1, and claim Flash Dancers, that highly profitable bazaar of naked bodies, to be a squeaky-clean operation, id. p.8-4. Such allegations by defendants are irrelevant and violative of Local Rule §28, but help, apparently in their opinion, to castigate the plaintiff for daring to fight for his rights.

The plaintiff requests the above cited violations of F.R.A.P. §30 and Local Rule §28 by Flash Dancers attorneys not be considered by the Court in its determination, that Flash Dancers attorneys submit a redacted brief and monetary sanctions be levied against them.

Municipal or Henning Brief

The Henning Brief failed to use the proper caption on its cover page in violation of F.R.A.P. §32(a)(2)(C), so the plaintiff requests the brief be rejected.

In the alternative, the attorneys representing Police Detective Robert Henning use the same trick as Mundy and Flash Dancers to inappropriately expand the Joint Appendix by citing to documents not in it. Henning Brief p.4-2

& 3, n.2. They, as did Mundy's attorneys, agreed to the Joint Appendix but now choose to violate F.R.A.P. §30 because of their own failure to include certain documents in the Appendix.

The plaintiff requests that the text on which the non-Appendix cites rely be redacted and not considered in making the Court's decision. Hollander also requests monetary sanctions be levied against Henning's attorneys.

Shipilina Brief

Defendant Alina Shipilina's attorney engages in irrelevant name-calling at Shipilina Brief p.2-1 in violation of Local Rule §28. Hollander requests the phrase "including ... throughout." not be considered by the Court in making its decision and monetary sanctions be assessed against Shipilina's attorney.

Bank of Cyprus

The Bank of Cyprus ("Bank") appeared in the proceeding in the District Court and was served with a Notice of Appeal and Pre-argument Statement. The Bank, however, has not filed a brief. Plaintiff-appellant, therefore, moves that this Court reverse the Fed. R. Civ. P. dismissal as pertaining to the Bank of Cyprus, *cf. Nielsen v. U.S.*, 976 F.2d 951, 957 (5th Cir. 1992), and levy monetary sanctions against the Bank of Cyprus' attorneys.

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